

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

AUTO PARTS CENTER, INC. :

ORDER
DTA NO. 815329

for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 1989 through February 29, 1992. :

Upon the motion dated June 7, 2002 of petitioner, Auto Parts Center, Inc., c/o Gevik Atakhanian, 246-06 51st Avenue, Douglaston, New York 11362, brought by its attorney, David L. Silverman, Esq., for an order vacating the determination dated July 23, 1998 in this matter and reopening the record to allow for the introduction of further evidence, and upon the affirmation in opposition dated August 23, 2002 of Barbara G. Billet, Esq., (Robert A. Maslyn, Esq., of counsel), and upon the documents of which official notice has been taken, Frank W. Barrie, Administrative Law Judge, renders the following order:

FINDINGS OF FACT

1. A determination dated July 23, 1998 was issued to petitioner by the Division of Tax Appeals, which denied its petition and sustained a Notice of Determination dated March 1, 1993, as modified by a conciliation order dated August 9, 1996. On July 23, 1998, a copy of this determination was sent by certified mail to petitioner, Auto Parts Center, Inc., at the same street address in Douglaston, New York as shown above and to its former representative, Alfred J. Parisi, Esq. The determination sent by certified mail to Mr. Parisi was returned as unclaimed to the Division of Tax Appeals, which resent it to him by regular mail on August 24, 1998.

2. The determination was based upon a review of an administrative record created by the parties pursuant to 20 NYCRR 3000.12, which authorizes the submission of evidence relevant to the issues in a controversy without the need for appearance at a hearing if the parties so consent. Petitioner's authorized representative, Alfred J. Parisi, and the representative of the Division of Taxation ("Division"), Robert Tompkins, Esq., executed a waiver of hearing and agreed to submit the matter for determination based upon documents. Pursuant to the administrative law judge's letter dated September 19, 1997, the following schedule was established for the submission of documents: filing of documents by the Division, October 17, 1997; filing of documents and a brief by petitioner, November 21, 1997; filing of the Division's brief, December 19, 1997; and filing of petitioner's reply brief, January 2, 1998. Pursuant to this schedule, the Division filed its documents, petitioner filed its brief and documents and the Division filed its brief. No reply brief was filed on behalf of petitioner. The judge's letter dated September 19, 1997 noted that, "The record will be closed to further evidence as of November 21, 1997, i.e., the date of petitioner's submission of documents and initial brief."

3. On May 11, 1998, petitioner's former representative, Alfred J. Parisi, was disbarred by a decision of the Supreme Court, Appellate Division, as a result of his multiple acts of conversion of funds deposited in his Interest on Lawyer Account. Approximately six months earlier, on December 19, 1997,¹ Mr. Parisi had been suspended from the practice of law by the Supreme Court, Appellate Division, "based upon his persistent failure to comply with the demands of the Grievance Committee in connection with a pending investigation" concerning a complaint filed on behalf of the U.S. Small Business Administration "alleging the conversion of

¹ Mr. Parisi was served with the order of suspension on December 29, 1997 according to petitioner's Exhibit "5" included in its motion papers.

funds entrusted to him as fiduciary.” Furthermore, on November 8, 1999, more than a year after attorney Parisi’s disbarment, the Supreme Court, Appellate Division, imposed a fine of \$1,000.00 against him for “acts of contempt” consisting of his “appearing at real estate closing as attorney for seller, and preparing escrow agreement, after suspension was entered”

CONCLUSIONS OF LAW

A. Petitioner has denoted its motion as one to reopen the record in this matter pursuant to 20 NYCRR 3003.23. However, in light of the pivotal fact that a determination in this matter was issued more than four years ago, petitioner’s motion, in substance, seeks to vacate a determination. Furthermore, the regulatory basis cited by petitioner for its motion is inapplicable. Pursuant to 20 NYCRR 3003.23(b), an administrative law judge has the authority to “order a continuance, extension of time or adjournment for good cause” which does not encompass the relief sought by petitioner.

B. 20 NYCRR 3000.16 which governs “motions to reopen record or for reargument” provides for “an order vacating a determination” of an administrative law judge upon the following limited grounds:

(1) newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding, or

(2) fraud, misrepresentation, or other misconduct of an opposing party.

Petitioner does not base its motion on either one of these two grounds but rather on his contention that his former representative was not authorized to practice law at the time he was representing petitioner. Such contention, even if proven, would not provide grounds to vacate the determination dated July 23, 1998 (*see, Matter of Youngstown Yacht Club, Inc.*, Tax Appeals Tribunal, October 16, 1997). Furthermore, 20 NYCRR 3000.16(b) requires that such

motion to reopen the record must be made “within thirty days after the determination has been served.” Petitioner is more than four years late in bringing its motion.

C. Moreover, at the time of the waiver of hearing and as of the date set by the administrative law judge for petitioner’s submission of its evidence, petitioner’s former representative was, in fact, authorized to practice law. Furthermore, pursuant to 20 NYCRR 3000.2, an attorney is not the only category of individual authorized to represent taxpayers before the Division of Tax Appeals. For example, a corporation may act through one of its officers or even one of its employees. Consequently, the implication of petitioner’s motion, that a taxpayer, appearing before the Division of Tax Appeals must be represented by an attorney, is without merit. There is simply no requirement that a taxpayer have an attorney representative in the Division of Tax Appeals, which is unlike the situation in a criminal proceeding where incarceration is possible and there is a constitutional right to an attorney.

D. In addition, even if petitioner had made the legal arguments delineated in its motion papers in the course of the submission process, the Tax Appeals Tribunal rejected such arguments in *Matter of Y & G, Inc.* (February 4, 1999), which, in fact, is a companion case to the matter at hand. This companion corporation’s principal officer was one of petitioner’s own officers, i.e., Yourik Atakhanian.²

E. In addition, petitioner’s petition was denied as a result of its failure to provide evidence of compliance with the exemption from sales tax under Tax Law § 1117. This statutory exemption covers the sales of cars to nonresidents who also have no permanent place of abode in

² The record created for this motion does not provide an explanation why the principals of petitioner, Gevik Atakhanian and Yourik Atakhanian, did not challenge the computation of sales tax at issue when it was asserted against them as individuals responsible for the collection of the corporation’s sales tax. According to an Exhibit “11” attached to petitioner’s motion papers, petitioner was dissolved by proclamation on June 26, 1996, and the Division has apparently proceeded against Gevik Atakhanian and Yourik Atakhanian as individuals.

New York State and who have no business in which the motor vehicle purchased will be used in New York State. The assessment at issue was based upon a test period audit which focused upon the sale of 135 cars by petitioner as follows: 55 in September 1991; 50 in October 1991; and 30 in November 1991. The total dollar amount for these car sales was \$661,500.00. Of these 135 car sales, the auditor treated 32 car sales as exempt from sales tax based upon documentation provided by petitioner during the conciliation conference stage. Most important, it is noted that petitioner has not attached any documentation for the remaining 102 car sales to its motion papers. In fact, the minimal documentation of car sales included in the motion papers concerns cars sold *subsequent* to the three-month test period at issue.

F. Petitioner points out that subsequent to the issuance of the determination dated July 23, 1998, the Division canceled penalties based upon its contention that Mr. Parisi failed to provide adequate representation. Petitioner contends that this shows that the Division “[agrees] with Petitioner that it had not been properly represented.” Rather, it is more accurate to say that this shows that the Division has been fair in its dealings with petitioner, and even at this late date, more than four years after the issuance of the determination, if petitioner were to produce documentation to demonstrate entitlement to the exemption under Tax Law § 1117, the Division would apparently review and consider such documentation.

G. It is ordered that the motion of petitioner Auto Parts Center, Inc. to vacate the determination in this matter and to reopen the record to allow for the introduction of further evidence is denied.

DATED: Troy, New York
October 31, 2002

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE